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INDEPENDENCE

Those who in 1776 in the English colonies of America favored separation from Great Britain, were confronted with two serious difficulties. The population of the Colonies was far from unanimous in respect to that step. The evidence is that not more than one-third of it was favorable. Another third was neutral. Still another third actively dissented from the proposal. There were wide stretches of territory where there was no agitation. The foci indeed of the spirit of revolt, were Massachusetts and Virginia. Pennsylvania, New York, the colonies south of Virginia, were opposed to extreme measures. In order to feel reasonably confident of success, the advocates of secession had before them, if possible, the conversion of a large dissentient part of the colonial population.

Another consideration was, that, even if the hostility to a revolutionary programme had been less pronounced than it was, the risk of failure in the use of force, against Great Britain, by the unaided colonists, seemed too great

to be taken by prudent men. But from what powers would expectation of aid be permissible? There was one, whom but 12 years before, the English colonists and the mother country had united in expelling from the continent of America. The French power had been an object of dread and jealousy, and no policy of Great Britain could have won a more enthusiastic approbation, than that of terminating French possession of any portion of the North American continent. While the French people had no reason to love, and did not love, those who had abetted their being deprived of Canada, and of the opportunity to establish a mighty empire along the Mississippi, they felt a centuries-old hatred of the Anglo-Saxons, whose seat was on the island beyond the Straits of Dover, with whom they had frequent wars, and from whom they had at times suffered defeats and political humiliations. It was imagined that, with a proper approach, the government of those people might be coaxed into an alliance, whose aim should be the permanent separation of the American portion of the Empire from the European portion. If America could not be French, it would be a solace that it had ceased to be English. The colonies had for months been governing themselves before they made any announcement that they would not again acquiesce in the rule of Britain. But it was seen that France must have some guarantee that, should she aid the colonists, they would not later (the war not going fortunately, or England making acceptable concessions) leave her in the lurch, exposed to the vengeance of her ancient enemy, thus actuated by an additional motive of hostility. A formal declaration of independence would make difficult the relapse of the men, who were the signers and promoters, into submission to the British Crown. The United States in Congress assembled on June 7th, received what was a declaration of independence, on the motion of Richard Henry Lee of Virginia, seconded by John Adams, of Massachusetts. Its words were "That these United Colo-

nies are and of right ought to be free and independent states, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is, and ought to be totally dissolved." Then follow the significant words, "That it is expedient forthwith to take the most effectual measures for forming foreign alliances."

A committee was appointed June 10th, to draft a declaration. A resolution declaring independence was adopted July 2d, Thomas Jefferson being the draftsman. The important matter, in the document thus produced, was the concluding paragraph, in which after affirming the rectitude of their intentions, the signers "solemnly publish and declare, that these united colonies are and of right ought to be free and independent states; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the state of Great Britain is and ought to be totally dissolved, and that as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce and to do all other Acts and Things which Independent States may of right do." This was explicit enough to show the present state of mind of the signers; but France was too prudent to rush headlong into an avowed alliance, and not till the British defeat at Saratoga, two years later, was she willing to manifest her collaboration with the colonies. The failure of the Revolution would have meant economic and social ruin to the men who made the declaration; and France thus had the pledge that whatever they or the colonies through them could do, would be done to secure success to the enterprise.

But, it was necessary that all the resources of the colonies themselves, should be combined in the effort to wrest independence from the English Crown.

How was that to be done? The minds of the residents of the colonies had to be operated on, in favor of

separation. A skillful writer like Thomas Paine, was imported from his native Britain, to write Common Sense and other books, in favor of the colonial positions, and to lessen respect for the offices of the imperial government, including the kingship. The extraordinary circulation and influence of these books are attested by several leaders in the struggle. It was not until the independence of the colonies had been recognized, that the author who had indoctrinated so many men with anti-English political opinions, became infamous in American churches for many decades and the name, not Thomas Paine, but Tom Paine, bore the stigma of infidel. In view of the number of men who had been opposed to secession from the empire and whom he reconciled to that movement, he may rightfully be regarded as one of the major agents in creating among the colonists the willingness to split the empire, and to unite with its Gallic foes in doing so. For those who were promoting secession, he was an Englishman fortunately destitute of the sentiment called patriotism.

The declaration then conceives that a long enumeration of alleged misdeeds of the British government, should be presented to the thoughts of the people. It had imposed taxes without the consent of the taxed. In some cases men had been tried without a jury. By using military force to repress and defeat the military force of the rebellious colonists, the king had abdicated government. The impulse of the writer, led him to enumerate, a large number of facts, which had not occurred until after the revolts in some of the colonies, and for the purpose of defeating them.

But, before embarking on the enumeration of classes of wrongs, done by the sovereign power, the averment contains what may be called its philosophy. "We hold these truths to be self-evident that all men are created equal." What the relation was between that thought and the breaking of a previously existing political tie, is not

easily discernible. It is a truth, it avers, that all men are created equal. The proposition is astonishing, and that it should emanate from those who uttered it, is none the less so. Are all species of animals equal (and does that mean) to all other species? The dog to the horse? the rat to the cat? And are all the members of the same species, equal to each other? Are all men equally beautiful, and strong, and capable of surviving to a certain age? Have they equal memories and imaginations, and argumentative powers? Are they equally laborious, self-denying, honest, just, good? All men are created equal. Does that insinuate that they are equal only at the instant of origination by the Creator? Does it insinuate that they lose equality as soon as they are created? There was a marked differentiation of men, with which the colonists were familiar. There were black men and red and white men. Were the former as fully endowed with "rights," as the latter? Evidence of the truth of the proposition is not to be sought. It is self-evident. Did the philosophy intended to be propagated, suggest that all white men were, at creation, equal; while refraining from knowing whether all black men were equal to each other and to white men, all red men were equal to each other and to whites? The rashness or want of clarity of the writers of the document has continued to perplex those who have deemed it as inerrant as an inspired writing. Not the humblest reader thus troubled has been the Chief Justice of the United States, Roger B. Taney. He saw that the words of the declaration seemed "to embrace the whole human family." But, he thinks the black man was not intended to be embraced. Why? Because the conduct of the men who issued the document "would have been utterly and flagrantly inconsistent with the principles they asserted". One of the rights mentioned as the endowment of their creator, was the right to "liberty." If the negro has the right by divine endowment,

[1]Dred Scott v. Sandford, 19 Howard, 393.

how wicked and profane those, who held him in bondage. To save them from condemnation, thought C. J. Taney, we are to believe that they meant by the expression, "all **white** men are created equal." Something makes self-evident the co-hesion of the white color and the right to liberty, but which gives no similar revelation as to equality of white and black, or even of black and black.

That the colonists believed blacks and reds, to be men, as well as whites, is clear. The constitution, emanating from substantially the same intellectual influence, recognized that Indians taxed, were a part of the representative population as well as such blacks as were "free persons," while blacks who were slaves were considered as equal to three-fifths of white or black free persons, not for their own benefit but for the purpose of increasing the electoral power of the white race.

It would have been indeed difficult to save the distinguished writers of the philosophy of the declaration from the imputation of insincerity. Among the signers perhaps there was none from the southern states, who did not own slaves and of whose later manumission of them, biography and history give any record. It was self-evident to those men that all white men had been endowed with an inalienable right to liberty, but they had no intuition of a similar endowment of red or black, or brown or yellow men.

The explanation of the omission of a color-word is conceivable. There were millions of men who could not accept as a self-evident truth, the allegation that the right to liberty was contingent on the pale color of the skin. If there was any expectation that the document would be read in Europe or even in the colonies, it was known that it would be understood to affirm a universal human right to liberty, and not one contingent on the white color.

No one has suggested that the declarants denied that

negroes or Indians were men, and hence did not conceive such things (or persons) as within the scope of their predication. Within a decade these men united in the formation of the Constitution, which distinctly recognizes blacks and reds as human beings.

The right to liberty, among white men, is, says the document "inalienable." But the state hangs or electrocutes for certain acts, called crimes. Somehow, the doer has "alienated" the right. The right to life would seem to imply the right to avoid exposures to perils which make death more or less likely. But the state declares war, marshals men into armies, and compels them to die, sometimes by the ten-thousands. Is the right to life of such persons inalienable? The government has by some process, discovered a way to compel its subjects to "alienate" life; and also to alienate liberty; and also to alienate the right to pursue happiness.

The declaration states that governments are created to protect the self-evident rights to life, liberty, pursuit of happiness. But these governments derive "their just powers from the consent of the governed." Must every government justify its claim to control a particular man, by showing that he has consented to it? In all countries, there is a considerable number of men who dislike some of its laws, some of its policies. They believe e. g. in peace, and believe there is no justification for a threatened war. But they are expected to submit. They can be conscripted, punished for disobeying military orders, etc., compelled to abandon home or business, take the dread risks of wounds and death; and all for a cause that is possibly hateful to them. At the Revolution, a half of the people were in favor of peace but they endured persecution because of their Unionism, because possibly they disliked the motives and temper of some of the prominent agitators. What was a signal merit from 1861 to 1865, viz to refuse to shake off the existing gov-

ernment, was in 1776, and later inexpiable wickedness.

The doctrine of the declaration has been outgrown in several respects. Imposing taxes without the consent of those who are taxed, is one of the wrongs enumerated. But the Supreme Court, in 1870 repudiates any superstition on this matter. Indians, members of a tribe, with which the United States had made a treaty, by which their property had been exempted from taxation, were, in violation of the treaty, compelled by the United States to pay a tax on certain articles. They had in no way, consented to this tax. The court held that the treaty was pro tanto repealed by an inconsistent later act of Congress. In repelling the attack on the tax as violating certain principles, Swayne, J., noticed that the tax was not on everything, but only on whiskey and tobacco. Then, as to these articles, the Indians pay only the same tax which those pay, who impose it. The burden, says the court, must rest somewhere. Revenue is indispensable (to the white man) to meet the public necessities. (White man not Indian necessities). "Is it unreasonable that this small portion of it shall rest upon these Indians?[2]"

A tax on stamps, and on tea was supposed, despite its limited area, to be intolerable by the advocates of secession in 1776, because imposed by a legislature in which the colonies had no representation. But a tax imposed on land, or incomes, or the prosecution of business, has been levied on the people of the territories incessantly, by a congress in which they were voiceless, and nobody has thought of its iniquity. C. J. Marshall distinguishes between British and American violation of the principle. If logic is patriotic, and varies with latitude and longitude, he may have been successful.([a])

One of the grievances specified in the declaration is "taking away our charters, abolishing our most valuable

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[2]Boudinot v. United States, 11 Wallace, 623.

([a])Loughborough v. Blake, 5 Wheaton 317.

laws, and altering fundamentally the forms of our government." But this is a power most energetically claimed for the Congress of the United States, in the organization of the territories, and in the displacement of their statutes, by laws enacted at Washington.[3]

The use of non-English troops to quell the rebellion was mentioned, as if the nationality of the individuals who fired a gun or wielded a bayonet could affect the moral character of the use of the implement. During the Civil War, thousands of Europeans took advantage of the high bounties for enlisting and offered themselves to the government, which was not reluctant to accept them. Doubtless thinkers in the South conceived this use of non-Americans to fight Americans, a gravely wicked act. They thought the same of the use of negroes as soldiers, to thwart the attempt to effect secession.

One of the improper acts of the Georgian government, was the retention of the removability of judges in the colonies. "He has made judges dependent on his will alone for the term of their offices, and the amount and payment of their salaries." Doubtless the degree of independence of the judges is a difficult matter to determine. All kinds of power, judicial no less than executive or legislative, may be misused. While the people of the states protected themselves by making the federal judges in their courts tenants for life of their offices, the same irremovability has been refused to the territorial judges who are appointed by the President, have a short tenure, and are removable by him.

Another dereliction imputed to George III is his assenting to legislation which contemplated "depriving us in many cases, of the benefits of trial by jury." Yet, the Supreme Court of the United States, a century and a half afterwards, has ratified convictions of crime in the Philip-

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[3]Church of Latter Day Saints v. United States, 136 U. S. 1.

pines of Americans, people of European origin, without indictment by a grand jury, and without the verdict of a petit jury. Congress established a code, which omitted to require this intervention of juries, and it had the constitutional power to do so.[b]

It is startling to see how fully the notions of the English government, at the time of the revolution have taken possession of those who interpret for us the views of the imperial part of our country with respect to its right and powers over its so-called territories, that is, its colonies. "The people of the United States," says Bradley, J., in an important case[4] "as sovereign owners of the National Territories have supreme power over them, **and their inhabitants."** The right to exercise this power, is not created by the territories, or their people, but by Congress, which is the agent of the people of the states. No one knows how a state can by conquest or cession, acquire the ownership of a tract of inhabited land, without the consent of its inhabitants and how the acquiring state thus becomes absolute political master of the people. Such is the present and oft repeated American doctrine. In an earlier case,[5] Marshall, C. J., observes "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquiring the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States," that is, the people occupying a tract of country cannot govern themselves. There is no right of self-government until the United States bestows it, by conferring statehood. The acquisition of territory, is the acquisition of the people on it, for possibly even

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[b]Dowdell v. U. S. 221 U. S. 325; Dorr v. U. S. 195 U. S. 128.

[4]Church of Jesus Christ of Latter Day Saints v. United States, 136 U. S. 1.

[5]Insurance Co. v. 356 Bales of Cotton, 26 U. S. 511.

their emigration from it, may be prohibited by the supreme power. The declaration complains of refusal of assent to certain colonial laws, by George III., but the power of the imperial American government, at Washington, to change or annul territorial laws, is affirmed by the Supreme Court.[6] Apparently to mitigate the despotism of the central government, as portrayed by him, Bradley, J., observes "Doubtless Congress in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments." But, he weakens the suggestion, by adding "but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."[7] But these constitutional restraints whether explicit or impiicit are imposed by the people of the states, and not by the people of the territories. They can all be removed by the people of the states, in the form of amendments to the constitution. The absoluteness of the power of the people in the states is as perfect, as it was in Great Britain over the colonies. The only consent the territorial or colonial people need to express, is their consent to be born, and to dwell within the boundaries of the territory. Such seems to be the revised doctrine of the masters of American policy, a remarkable reversion to the doctrines imputed to the English government, by the eloquence of the separatists of 1776.

The important element in the declaration was its announcement of the termination of the submission of the colonies to trans-Atlantic control. It was not necessary to establish the wickedness or unreasonableness of the ministry of London. There was no sufficient reason for

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[6]First Nat. Bank v. Yankton, 101 U. S. 129.

[7]Church of Jesus Christ, etc. v. United States, 136 U. S. 1.

the continuance of colonial subordination, if the colonists were willing to dispense with the advantages of union with England. Their leaders, men like Washington, Jefferson, Hamilton, John Adams, Benjamin Franklin, were quite as able to manage affairs as any that were forthcoming in the island seat of the government, and they were quite as willing. No dispassionate person can doubt that the unwise acts of the London government had made continuance of amicable relations very difficult. But the real causes of dissatisfaction could not be portrayed and the vituperative parts of the declaration were intended to affect the mind of the masses, and make them more ready to welcome the extreme act of separation, than they probably would have been.

When will men learn that an agitatorial political document, not written by angels, must invariably be tinctured with insincerity and extravagance? faults of men usually good, when promoting a business or political policy which needs the cooperation of many uncritical minds?

Note—The treaty of peace between Great Britain and the thirteen states was signed, Sept. 3rd, 1783. It provided that, in order that hostilities might cease, all prisoners on each side should be set at liberty, and Great Britain, should "with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants," withdraw all its armies, garrisons and fleets from the United States. Thus, negroes, which were property of the American inhabitants, on the 4th day of July 1776, were still "property" on Sept. 3, 1783. So self-evident was it, that all men were created equal, and that "liberty" was one of the inalienable rights, with which their Creator had endowed them.

Note 2—Jefferson's draft of the declaration contained a clause "condemning the slave trade in no measured terms," but of course, making George III responsible for it. But, says Channing, History of U. S. Vol. 3, p. 202,

"this displeased not only the Southerners, but some of the New Englanders for many of their constituents had been engaged in that commerce." The Congress therefore omitted the condemnation of the slave trade, yet retaining the statement that all men were created equal, and hence had the inalienable right to liberty.

And when, in 1787, four years after the cessation of the war, the constitution was drawn up, it was made to provide that congress should not have the power until the year 1808, to prevent the **importation** of such persons as any state existing in 1787 should choose to admit. So careful was it to keep open the gates for the introduction of slaves from Africa and elsewhere, that, when providing for amendments it directed that no amendment should operate so as to authorize a prohibition by congress of the importation of slaves, until the year 1808. How profound must have been the belief of its framers and ratifiers, in the self-evidence of the dictum—that "all men are created equal" and endowed by the Creator with the "inalienable right" to liberty.

MOOT COURT

MOORE MOTOR CO. VS. HOME INSURANCE CO.

Insurance—Automobile—Conditional Sales—Knowledge—Illegality—Validity

STATEMENT OF FACTS

The plaintiff had a policy of insurance with the defendant, whereby the defendant indemnified the plaintiff against all direct loss it might sustain because of confiscation of any autos, conditionally sold, for violations by other than the vendor, of the Nat. Prohibition Act. He conditionally sold a car, the purchaser violated the Act and the car was confiscated. When he sold the car he knew that the purchaser was to use it for the illegal hauling of liquor. Suit on the policy, defense illegality of the policy.

Allen, for Plaintiff.

Ditty, for Defendant.

OPINION OF THE COURT

Barger, J. The facts of the case are not disputed and the defence illegality of the contract is clear. The cases on this point are few and we have not been able to find a case with facts identical to these.

The first question which arises, is the policy against public policy. What is this so called public policy? Elliot gives a very good definition of it in his book on Contracts. "A principle which holds that no citizen can lawfully do that which has a tendency to injure the public or which is against the good of the public." In the case of The Taxicab Motor Co., vs. Pacific Casualty Company, 132 Pac. 393, there was a contract insuring against any loss caused by a violation of the speed laws by one of the employees of the Taxicab Co. The court in that case gave the following rule. "A contract indemnifying the insured against the consequences of a violation of a criminal statute by him is void, as against public policy; but a contract of insurance against the consequence of a violation of a

criminal statute by a third person is lawful." This seems to be the law and is also stated the same in Corpus Juris, Vol. 32.

In the case we are considering another element enters however. The knowledge of the plaintiff must be taken into consideration. The case cited also held, "A contract indemnifying another against consequences arising from willful violations of a statute or commissions of a crime generally are void." The reason stated is because they are against public policy. The case in question is similar to this. The plaintiff willfully sold the car for the express purpose. He knew at this time that it was an unnecessary risk and might be called negligence on his part. If a person can be insured in such a case he is naturally going to sell regardless of the fact that the car is to be used for an illegal trade. It seems as if he should be estopped from any recovery to prevent this. This tends to cause the violation of our statutes and should whenever possible be prevented.

The learned counsel for the defendant has tried to bring fraud into the case. We fail to see his point and hold that the case is free from any fraud. He fails to see the difference between a contract between two parties, which is void, and a contract between two parties for the unknown acts of a third party, which is valid. The case in question comes under the last. The lack of knowledge is what gives the contract its validity. He has failed to see this point.

The learned counsel for the plaintiff has cited the case of Young vs. Stevenson, 200 Pac. 225, which allowed a party to insure against loss occasioned by any contingent or unknown event. This is against his own centention for in the case we are considering the event was known. He also cites the case of Long vs. Becker, 106 Pac. 466. This case held that if the act is done within or with the knowledge and consent of the insured the policy is void. This is also against his own contention. There was knowledge in the case at bar .

We believe that the rule should be, that a person can insure against unknown acts of third parties. If A gives a policy to B, which insures B against any violation of a statute we believe it should be void, as against public policy. If B insures against the acts of C, which are unknown to him, we believe this should be valid. It is hard to control the acts of third persons, when the chattel is absolutely under their control. Business of today demands such contracts and for its advancement they must be made. A large number if not the majority of the cars sold now are sold under what is known as the time payment plan. Should the dealer have to suffer the loss caused by the person to whom he has sold the car? We say no, unless he has knowledge that person is to use it in such a manner that it is most certain that it will be confiscated. We be-

lieve if he could not insure against such a loss few cars would be sold and consequently business would be curbed, and this in the end would result in a great loss to the public.

In the ordinary case if we prevented the plaintiff from recovering we would subject a vast amount of people to the fraud of insurance companies. They would enter into the contract and then put up the cry of the illegality of the contract. The courts have had a tendency to check such a practice.

We believe the plaintiff could have recovered but for his conduct. In view of the facts of the case we hold the contract to be illegal and enter judgment for the defendant.

OPINION OF SUPREME COURT

The learned court below has decided that contracts of insurance indemnifying the insured against loss occassioned by the violation of criminal statutes by third persons are valid and not contrary to public policy. In this he is correct nor can any substantial reason be advanced why the conditional seller of a car may not insure against loss arising from the seizure. No violation of statute is encouraged for any collaboration by the insured in the criminal act will avoid the policy. What then was the effect of the sale of the car with knowledge of the intended wrongful use thereof? Relying too greatly on his ideas of what the law should be, has led the learned court below astray. Mere knowledge by the vendor of the intended illegal use by the vendee does not make the sale illegal or void, Conemaugh Co. vs. Bennett, 60 Super. 543. The sale being valid, no reason can be seen why it should avoid the policy. The insurer may protect against such an increase in risk if he so desires.

The judgment of the learned court below is reversed and judgment is here entered for the plaintiff.

HATHWAY VS. CITY OF SCRANTON

Municipalities—Negligence—Defective Streets—Proximate Cause—Contributory Negligence—Forseeability of Consequence

STATEMENT OF FACTS

While riding on a public highway in Scranton which was full of ruts and holes in which mud and water had collected, Hathway, on a bicycle, passed a truck going in the opposite direction. One of the wheels of the truck unavoidably struck a hole and splashed mud and

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STATEMENT OF FACTS

While riding on a public highway in Scranton which was full of ruts and holes in which mud and water had collected, Hathway, on a bicycle, passed a truck going in the opposite direction. One of the wheels of the truck unavoidably struck a hole and splashed mud and

water into the plaintiff's face. Several months later he lost the sight of one eye due to this splashing. The highway had been in this condition for several years and the plaintiff was familiar with it, using it continually. The plaintiff seeks $5000 for the loss of the eye.

Barger, for Plaintiff.

Brody, for Defendant.

OPINION OF THE COURT

L. Cohen, J. This is an action to recover damages for the loss of an eye. It is alleged by the plaintiff that city was negligent in keeping the highway in an unsafe condition for several years; and that this negligence was the proximate cause of his injury.

That the City of Scranton was negligent in keeping its highways in an unsafe condition for a period of several years is sufficiently axiomatic not to require the support of authorities. This proposition was very concisely set out in the late case of Lawrence et ux. vs. City of Scrantan 284 Pa. 215 in which the learned judge states: "The general rule is that municipalities having full and complete control over their streets are liable in damages for injuries sustained in consequence of their failure to use ordinary care to keep them in a reasonably safe condition for travel." The court states further in that case that in order to fasten liability on the city, it must have notice of the negligent condition of the highway and such notice may be actual or constructive. There can be no question that the city had at least constructive notice in this case and because of these facts we do not hesitate in saying that it was guilty of negligence in permitting the highway to remain in an unsafe condition for several years. Haughney vs. Mahoney City 264 Pa. 482.

The next question to be decided is whether the city's negligence was the proximate cause of the plaintiff's injury. In considering this question Mr. Justice Shoemaker in Henry vs. Phila. 264 Pa. 33, stated that it was a question for the jury to decide whether a hole in the city street was the proximate cause of the injury to a pedestrian caused by being struck by a wagon wheel which broke off the axle and rolled upon the side walk when the wagon struck the hole in the street. It was found in that case that the hole in the street was the proximate cause of the injury.

This question was also considered in the very late case of Stemmeler vs. City of Pittsburgh 287 Pa. 365, a case which is practically identical with the case at bar and the court held that the city's negligence was the proximate cause of the injury. We are bound by the holdings in these cases to answer affirmatively that the city's negligence was the proximate cause of the injury in the present case.

It has been contended by the counsel for the defendant that the city's negligence was not the proximate cause of the injury but that the splashing of the mud by the truck was an efficient intervening cause. In view of the decisions in the cases cited above we do not feel that the passing of the truck was an efficient intervening cause and hence break the causal connection. Altho the city might not forsee that mud would be splashed in some one's eye it was probable and forseeable that some one would be sometimes injured due to its negligence.

The def. further contends that the plt. was guilty of contributory negligence because his act of traveling on the road was voluntary assumption of risk and he cites the case of Smith vs. Shamokin Borough 268 Pa. 170 in his behalf. This case is in no way similar to the one at bar. There the plt. had a choice of several routes and deliberately selected a dangerous one. We cannot agree that this was a voluntary assumption of risk because the plt. had a right to use this highway as a mode of travel and since he used it in a proper manner we do not feel that he was guilty of contributory negligence.

Having found (1) that the city was under a duty to keep the road in a reasonably safe condition and (2) that the city was negligent in not doing so and (3) that this negligence was the proximate cause of the injury and (4) that the plt. was not guilty of contributory negligence; we therefore grant judgment to the plaintiff in the sum of $5000.

OPINION OF SUPREME COURT

Adopting the "foresight" view of proximate cause, there can be no doubt of the city's negligence. To predict that autos, passing over a street so full of holes that it would be physically impossible not to strike some of them, might splash accumulated mud and water onto passers-by requires no stretching of the imagination. The result, clearly, should have been foreseen and avoided. But, on the other hand, the danger of such an occurence was not so imminent that one using the street with knowledge of its condition was guilty of contributory negligence. To so hold would reduce the city's liability for defective streets to a mere shadow.

The case of Stemmler v. Pittsburgh, 287 Pa. 365, 135 Atl. 100 is ample authority for the court's decision. The judgment of the learned court below is affirmed.

COMMONWEALTH VS. MARTIN

Criminal Law—Burglary—Alibi—Evidence—Time Cards—Original Entries of Garage Owner

STATEMENT OF FACTS

This is a prosecution for burglary. The Commonwealth contended that the defendant was in his car at the scene of the crime five minutes before it occurred. The defendant testified that neither he nor his car were in the place claimed and in order to corroborate his testimony, sought to introduce workmen's time cards which showed that his car was in a garage being repaired at the time. The cards were produced by the owner of the garage from its records and were verified by him. The cards were refused and on conviction the defendant appeals, assigning this refusal of evidence as error.

Edwards, for Plaintiff.

Flannery, for Defendant.

OPINION OF THE COURT

Garrison, J. The question to be determined by the court, in this case is whether the time-cards of the workmen verified by the garage owner are admissable in order to support the defendant's alibi.

A defendant may properly oppose convicting testimony by evidence that he was at another place at the time the crime was committed. (Commonwealth v. Morton, I Kulp 280.) For this purpose, defendant, offered the records of the garage owner.

Books of accounts and records are sometimes admissable in evidence in corroboration of the testimony of witnesses, as well as to prove the accounts listed. (Young v. Commonwealth, 28 Pa. 501.) They may be used in the same manner as any other document or writing. The records in the case were brought in for the purpose of corroborating the testimony of the defendant.

The cards offered in this case were records of original entry. Before the courts will receive private records and books of original entry in evidence, they must be satisfied that the records are a true statement of the facts they purport to record. For this purpose they are required to be verified by some person having knowledge of the transaction involved. The stringent rules of the common law covering the verification of such records have been gradually relaxed, so that at the present time it is not necessary that the verification be made by one who actually performed or observed the act recorded. If the entries are made in the daily course of business

from the reports of subordinates, the courts are satisfied if the entries are verified by the person making them. To illustrate this proposition, we might refer to the case of Jones v. Long, 3 Watts 325, in which case a wagoner informed the maker of the records as to the deliveries made that day from which report the original records were made. If they are not verified by the person who made them and it is not shown that such person is either dead or out of the jurisdiction they are inadmissable. (Caffee & Co. v. United States, 85 U. S. 516.) The courts of Pennsylvania have so liberally applied the rules of authentication, that when the records are made by servants, under the personal supervision and verification of the employer, they are admissable on the oath of the employer. (See Ehmling v. D. L. Ward Co., 279 Pa. 529; 10 R. C. L. Sec. 373).

The rules on this subject, as stated above, should dispose of the case at bar. But the court is in some doubt as to the time and kind of verification referred to in the facts as stated. The verification of these cards could have been made by the owner of the garage at two different times. They could have been verified either at the time of making the record or at the time of the trial. If verified by the garage-owner at tthe time the workmen made or punched the cards, they clearly would have been admissable, under the rule laid down in the case of Ehmling v. Ward, super. On the other hand, if the garage-owner attempted to verify them for the first time at the trial they were properly barred by the trial court. The sufficiency of verification is a question within discretion of the trial court. (Caffey et ut v. Penn. & Reading Railroad Co., 261 Pa. 251.) We must infer from the decision of the court below that the time of the verification of these cards was at the time of the trial and hence insufficient.

The counsel for the Commonwealth has cited cases upon which he bases his contention but we find that they are not on point. The case of Commonwealth v. Berney, 28 Super 61, the record offered was not an original record and therefore not admissable. Also the case Samuels v. Penna. Railroad Co., 45 Super 395, there was an attempt to prove the weight of certain cars by weight tickets, they failed to identify the tickets with the transaction in question.

In view of the foregoing conclusions, and statements of law, we affirm the decision of the trial court.

OPINION OF SUPREME COURT

The recent case of Comm. v. Grotefend & Haun, 85 Super. 7, (1925) discloses the liberal tendency to relax the strict rules of evidence the bases of which are largely destroyed by modern business

usages. Here time cards are produced and verified as original entries by the owner of the garage. The actual makers of the cards are not called and no evidence showing that the cards were made in the sight of or under the supervision of the witness. If such entries are admissable when made by common carriers, what reason can be given for their refusal when made in garages? We can see none. No suspicion of manufactured evidence is even suggested here. The fact that the entries are on cards and not in books should not bar them. We can see no reason for their refusal when their admission, not verified by the original makers, is guarded by instructions from the court that this fact is evidence against their creditability.

The instant situation was so decided in State v. Martin, (W. Va.), 134 S. E. 599 and should be followed by us.

Consequently we are constrained to reverse the judgment of the learned court below and a v. f. d. n. awarded.

COMMONWEALTH VS. X CORPORATION

Taxation—Corporations—Bonds—Non-Resident Owners—Collateral

STATEMENT OF FACTS

Certain bonds of the X corporation, incorporated and doing business in Pennsylvania, were owned by a resident of Pennsylvania but held by a non-resident as collateral security for a debt. Certain other bonds of the corporation were owned by a non-resident but held by a Pennsylvania resident as collateral security for a debt. This is a suit by the Commonwealth to collect the tax on corporate loans which the corporation refused to pay.

Thomas, for Plaintiff.

Weiss, for Defendant.

OPINION OF THE COURT

Shissler, J. The statement of the facts as presented to the court must be divided into two parts and considered separately. First we have the case of where the bonds of X corporation are owned by a Pennsylvania resident but held as collateral security for a debt by a non-resident. Secondly we have the case of the bonds of X corporation being owned by a non-resident but held by a Pennsylvania resident as collateral security for a debt. The Commonwealth of Pennsylvania now seeks to collect the four mill tax on corporate loans as imposed by legislative acts. The defendant in this case

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admitted its liability in the first case i. e. on the bonds owned by a Pennsylvania resident and is prepared to pay the tax but very emphatically and ably denies its liability for the tax in the second case i. e. on the bonds owned by a non-resident.

Before we consider the taxation of the bonds in question it is necessary to know something about X corporation. Since the specific character of the corporation has not been called to the attention of the court by either the plaintiff or the defendant we shall consider that it is not a member of that class of corporations exempted from corporate loan taxation as set forth in the acts of legislature upon which the plaintiff's claim is based. Furthermore the plaintiff does not allege that when the corporation was incorporated in Pennsylvania and granted its charter that the Commonwealth of Pennsylvania expressly provided for such taxation and neither does the defendant deny such a provision. We therefore shall consider that nothing is said in the articles of incorporation and the charter as granted permitting specifically such taxation. Later in the opinion, however, the court shall consider the effect and constitutionality of such a provision but such discussion shall be regarded as mere dicta except in so far as it throws light upon the authorities and citations of the plaintiff.

It may be advisable to note the fact that the holding of the bonds of X corporation as collateral security for a debt in both the instances does not affect the question of taxation as raised in this case. It is a well settled principle of law that the situs of the bond for the purpose of taxation is not dependent upon the residence of the pledgee. Commonwealth vs. Curtis Publishing Co., 237 Pa. 333. Therefore for the purposes of this case we can dismiss this fact from further consideration. If the facts had been, however, that the bonds were owned by a non-resident but held by a resident as attorney, agent or trustee then they may have been taxable under the principles as stated in the Re: Tax on Corporate Loans, 1923 Pennsylvania Corporation Report 93; Commonwealth vs. Lehigh Valley R. R., 129 Pa. 429. In the case at bar, however, it is not necessary for us to decide this question since the relation was one of pledgee and pledgor and not one of attorney, agent or trustee.

The liability of X corporation, in the case where the bonds were owned by the Pennsylvania resident but held as collateral security for a debt by a non-resident, and which it admits and is prepared to pay is primarily based upon the act of June 13, 1913 P. L. 507 which provided:

Sec. 1.—Be it enacted etc. That all personal property of the classes hereinafter mentioned, owned, held or possessed by any person, persons, co-partnership, or unincorporated association or

company, resident, located or liable to taxation within this commonwealth, or by any joint stock company or association, limited partnership, bank or corporation, formed under any of the laws of this commonwealth or of the United States or any other state or government, and liable to taxation within this commonwealth whether such personal property be owned, held or possessed by such person or persons etc. in their own right or a trustee or in any capacity for the use, benefit or advantage of another person etc. is hereby made taxable annually for county purposes at a rate of four mills on each dollar of value thereof.

Sec. 17—All scrip, bonds etc. on which interest shall be paid by any or every corporation, whether incorporated under the laws of this commonwealth or the laws of any other state of the United States and doing business in this state are made taxable at the rate of four mills on the dollar.

This act was amended by the acts of July 15, 1919, P. L. 955 and July 13, 1923, P. L. 1085. The result of these amendments primarily was to impose upon the treasurer of the corporation the duty of collecting the four mill tax and to change the tax as levied from a tax for county purposes to a tax for state purposes. The original act of 1913 and its amendments of 1919 have been held constitutional and the collection of the tax imposed thereby from resident holders has been sanctioned. To date, however, we find no case questioning the constitutionality of the act of July 13, 1923. We therefore conclude that X corporation, as it admits, is liable for the tax but whether the 10% penalty as provided for by statute shall be imposed we are not asked to determine.

In considering the second case, where the bonds were owned by a non-resident but held as collateral security by a resident for a debt, we experienced considerable difficulty in arriving at a satisfactory conclusion since we did not know whether the corporation charter provided for such a tax. But as we have heretofore said we shall consider that no such provision existed.

In the case at bar the counsel for the plaintiff has cited many cases and authorities some of which are based upon the fact that the state created the corporation and expressly provided for taxation of corporate loans, whether held by residents or non-residents. He does not, however, allege that such a provision is in the charter of X corporation. Since the plaintiff has spent considerable time urging such a construction upon the court we feel justified in briefly tracing the origin, development and the application of such a principle in Pennsylvania.

The old rule expressed in the maxium "mobilia sequuntur personam", by which personal property was regarded as subject to the

law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In the modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, the rule of law that "the state in which a corporation is organized may provide, in creating it, for the taxation in the state of all its shares, whether owned by residents or non-residents", Rhode Island Hospital Trust Co. vs. Doughton, 43 Am. Law Reports 1374; Rogers vs. Hennepin County 240 U. S. 184.

Nevertheless the maxium "mobilia senquuntur personam" embodies the general principle in relation to situs for the purpose of taxation of intangible personal property, such as bonds, stocks, and the like, and still is the general rule in the absence of controlling circumstances to the contrary; Ruling Case Law 26, page 82.

It is true that in other jurisdictions the doctrine has been modified and limited by express statute and the power to so legislate has been upheld by the United States Supreme Court, New Orleans vs. Stempel, 175 U. S. 309.

It has not been pointed out to us, nor have we been able to find, that the doctrine has been modified or limited in Pennsylvania by any statutory provision. It would seem that if a change or modification was intended to be made, the legislation would have clearly indicated it. Commonwealth vs. Curtis Publishing Co. 237 Pa. 333. In the absence of any such legislation we shall construe the case in the light of the doctrine which for years has been sustained by the courts of this state. Namely that the situs of intangible personal property for taxation, such as bonds, mortgages and other evidences of indebtedness, is the domicil of the owner, Commonwealth vs. Standard Oil Co., 101 Pa. 119; Commonwealth vs. Pa. Coal Co., 197 Pa. 551. While a state may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extraterritorial operation, Frick vs. Commonwealth of Pennsylvania, 268 Pa. 489.

The courts of Pennsylvania are now in accord with the Supreme Court of the United States. The highest judicial body in America in its famous case of Commonwealth of Pa. vs. The Cleveland & Painesville R. R. Co.—'State Tax on Foreign held Bonds'—15 Wallace 300 decided that "the power of taxation of a state is limited to persons, property and business within her jurisdiction. Bonds issued by a corporation are property in the hands of the holders and when held by non-residents of the state in which the corporation was incorporated, they are property beyond the jurisdiction of that state.

A law of Pennsylvania, which requires the officers of a corporation to retain the tax out of the interest which the corporation must pay the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power of the state. The tax laws of a state can have no extraterritorial operation; nor can any law of a state inconsistant with the terms of a contract, made with or payable to parties outside of the state, have any effect upon the contract while it is in the hands of such parties or other non-residents of the state". This court has sustained this same idea in Louisville Ferry Co., vs. Ky., 88 U. S. 385; Del. R. vs. Pa. 198 U. S. 341.

Therefore we conclude in the light of the foregoing discussion, citations and authorities that the Commonwealth of Pennsylvania cannot tax the bonds of X corporation held by a non-resident even though they be held as collateral security for a debt by a resident.

X corporation, however, will pay to the Commonwealth of Pennsylvania such amount as is due on the bonds owned by the resident of Pa. even though they be held by non-resident as collateral security for a debt.

OPINION OF SUPREME COURT

The learned court below has correctly decided on the authority of Commonwealth vs. Buffalo & Lake Erie Traction Co. 233 Pa. 79, that the bonds owned by residents of this state were taxable even though they were held by non-residents as collateral security.

We cannot concur, however, in the holding that the bonds owned by non-residents but held by residents as collateral security are not so taxable. The learned court admits that a state may, by legislation, make the situs of the bonds for taxation purposes, their physical situs; N. O. v. Stempel, 175 U. S. 309. He fails to find such a legislative change, however, relying too strongly on cases decided prior to the present act. The act lays the tax on "property owned, held, or possessed by any person—or in any other capacity". Surely this is a definite legislative declaration that the situs shall be either that of the owner or possessor. Surely the resident here possesses the bonds. The legislature intended to levy this tax and it is clearly not unconstitutional. Cf. In Re Tax on Corporate Laws, 11 Pa. Corp. Report, 93 for analagous cases.

The judgment is accordingly **reversed** as to the second tax.

TERRY'S ESTATE

Wills—Accumulations—Annual Disbursements—Act of 1853 Inapplicable

STATEMENT OF FACTS

Terry, in his will, directed his executors and trustees to set aside a sum sufficient in their judgment to provide an annual premium on a life insurance policy taken out by the testator on the life of his son-in-law, the policy to be payable to the wife of the assured testator's daughter. The trustees, claiming it to be a void accumulation, refuse to pay the premium. This is a bill in equity by the beneficiary to compel performance.

Mrs. McDonald, for Plaintiff.

Mulhollen, for Defendant.

OPINION OF THE COURT

Lilienfeld, J. By the terms of the Act of April 18, 1853, Sec. 9, (P. L. 507) and by the terms of the Thellusson Act the periods of permitted accumulation are in the alternative and not cumulative so that the accumulation is allowed either during the life of the settlor, or during the minority of a person living at the settlor's death or for a gross period of twenty one years after his death or as a final alternative during the minority of a person, who if of age, would have been entitled to the estate if no accumulation had been directed. 4 Purd. 4036.

An accumulation is the adding of the interest or income of a fund to the principal, or the withholding of income from present distribution, for the purpose of creating a constantly increasing fund for distribution at a future time. Wahl's Estate W. N. C. 249.

The principal question in the case at bar that we propose to determine is whether the directions in the will for the payment of the premiums on the policies of life insurance, out of the income of the testator's property, affected by the testator upon the life of another person is valid for the whole of the life insured. There is no question of the validity of the accumulation until 21 years after the death of the testator, but what we are considering now is whether it is valid after the 21 years have elapsed.

The question depends wholly upon the statute above cited, for there is no doubt that at common law the direction would have been perfectly good, a circumstance not to be disregarded in construing the statute. Bearing in mind these views it is necessary I think, in

order to arrive at a sound conclusion upon the present question to consider the statutes with reference to their enactments and their spirit and intent.

The enactments in both are almost identical and state that no person shall settle or dispose of real or personal estate so and in such a manner as that the rents, profits, income or produce shall be accumulated beyond the prescribed period. Why is the court to put a strained construction upon them and cut down the undoubted right which existed before the statute, beyond what the language of the statute in its ordinary interpretation imports? The defendant claims that the court ought to do so because the spirit and intent of the statute was to prevent accumulations and the suspension of the beneficial enjoyment; but this argument appears to beg the question for it assumes that what the defendant here calls an accumulation, suspending the beneficial enjoyment was an accumulation intended to be prevented by the statute.

It was said in argument by the counsel for the defendant that the payment of the income to the insurance company in the present case was of itself an accumulation; that the company are recipients of the income for the purpose of accumulation; that what was done was analagous to the payment of rent to an individual, to accumulate in his hands and to be paid over at the death of the life insured. I do not see how the payment of the premium to the insurance company out of the income is an accumulation of the income. The premiums when paid to the insurance company become part of the general funds, subject to all expenses; and, altho it is true that the funds in the hands of the company do generally produce accumulations it is impossible to say what accumulations arise from any particular premium.

It was also argued by the defendant that it was an accumulation as to the estate, because the estate receives back a certain sum upon the death of the party whose life was insured; but what the estate receives back is not the accumulation of the income but a sum payable by the office by contract with the testator; and is this an accumulation within the meaning of the statute? The history of the statute (Thellusson Act) goes far to show that it is not; and we think the language of the enactment confirms this view.

The only other argument which may arise if the dispositions of this will are upheld is that mischief might ensue from policies of insurance being resorted to for the purpose of avoiding the statute. In answer to this we entertain no apprehension of any such mischief, we think that testators who contemplate accumulation are far too keen sighted to incur risks to which such a course of proceeding will be exposed. On the other hand, we see numerous mischiefs which

would arise from the construction for which the defendants contend. The case before us is but one instance of the difficulties to which such a construction would lead. If it is to be supported, what is to become of partnership agreements for long terms of years where certain sums are to be drawn out annually and the remaining profits are to accumulate and be divided at the ends of the terms? What is to be done with policies of insurance on the lives of debtors?

Cases involving questions analagous to the case at bar have very seldom been litigated in courts of this country but have come into light more frequently in England. The following English cases sustained the point of view that we have taken as a deciding one in this case. Basil v. Lister, 9 Hare 77; Re Vaughan, Halford v. Close, W. N. 89; Cathcart's Trustees v. Heneages Trustees 10 R (ct. of sessions) 1205; also Laws of England, p. 381, sec. 776; Lewin on Trusts, p. 182; 1 Wews English Reporter, 149.

The above citations have laid down the doctrine as follows: A direction by will, to pay out of the testators property the premiums upon a policy of life insurance, affected by the testator upon the life of another person, is valid for the whole life insured, and is not an accumulation by the Thellusson Act (39 and 40, Geo. 3 c 98) and therefore not an accumulation under the act of April 18, 1853 since the provisions of the act of 1853 are all embodied in the Thellusson Act. In estate of John Grim 15 Phila. 603 and Klein's Estate 11 W. N. C. 354 the courts have gone so far as to say that when the accumulations are to be paid to a legatee absolutely after the death of certain annuitants said legatee is not entitled to stop the accumulations during the lives of the annuitants—the accumulation being a valid one. We consider these mentioned Pennsylvania cases in the same light as the case at bar.

We, therefore, in view of the statute and citations, are of the opinion that the case of the plaintiff should be upheld and I decree the verdict in his favor.

OPINION OF SUPREME COURT

Since the period named by the will is not one allowed by the Act of April 18, 1853, (P. L. 507), the direction of the testator is void if it is an accumulation. What is an accumulation? It is not defined by the act. Wahl's Estate defines it as a "withholding of income for the purpose of creating an increased and constantly increasing fund for distribution at a future time." We can see no withholding of income here. The income is expended yearly by being paid to the insurance company. Is there an increasing fund for distribution? Clearly not as the fund payable to the wife of the insured will be no greater next year than now. The Act is a vague one and should

not be extended by judicial construction. The English cases cited and In re Hartman's Estate, (N. Y. 1926), 215 N. Y. Supp. 802 are, in the absence of Penna. precedent, sufficient to sustain the present holding.

The judgment of the learned court below is accordingly affirmed.

TOWER VS. TELEGRAPH CO.

Negligence—Telegraph Companies—Damage—Measure of Delay in Transmission

STATEMENT OF FACTS

Action of trespass for damages for the failure to deliver a telegraph message promptly. The message was filed in the defendant's office in Philadelphia at 4 P. M. on Mar. 21. It was delivered Mar. 22 at 10 A. M. It was—"Cannot ship two hundred crates. Can ship 100 crates at same price. Answer immediately." Ripe Produce Co. Plaintiff answered at once on the receipt of the telegram accepting. The answer was too late. On Mar. 22, the price of eggs per crate increased $2. The plaintiff seeks to recover $200 as damages.

McLaughlin, for Plaintiff.

Novojovsky, for Defendant.

OPINION OF THE COURT

Mulhollen, J. A telegraph company owes a duty to receive and **promptly** and correctly transmit a message which is in accordance with the rules and regulations of the company and a **failure** or refusal to perform such duty without legal excuse renders the company liable for damages proximately resulting from such neglect of duty. U. S. Telegraph Co. vs. Wenger 55 Pa. 262, in which Judge Thompson said, "No such reason was given, indeed no reason at all was given for failure to transmit the message to its destination. Thus, was there presented a clear case of gross negligence against the telegraph company in performing its undertaking, and a consequent liability to the plaintiff for such damages as he had sustained in consequence thereof." In the case just mentioned a telegram sent to New York was delayed in Philadelphia, and the failure of the telegraph company to deliver it promptly resulted in loss to the plaintiff in buying stock.

The duty of delivering a message promptly is owed the sender

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The duty of delivering a message promptly is owed the sender

and also the addressee. The plaintiff addressee in the case at bar has a right of action against the Telegraph Co. for not delivering the message promptly, and the Telegraph Co. is liable for misfeasance as a wrongdoer. Bailey vs. Western Union Telegraph Co. 227 Pa. 522. The remedy of the addressee is in tort for the breach of the public duty owed by the Telegraph Co., independent of the promise of the contract. (R. C. L. page 591 note 16).

The defendant failed to deliver the message for eighteen hours after he received it. He offers no legal excuse, in fact he offers no excuse at all for the delay and this we hold gross negligence. Western Union Telegraph Co. vs. Cunningham 99 Ala. 314-14 So. 579). The message showed on its face that it was one of business and of commercial importance requiring immediate transmission, hence it was forseeable that harm would befall the plaintiff unless the telegram was delivered promptly. The defendant's failure to regard this notice charged him with liability to the plaintiff. (Bailey vs. Western Union Telegraph 227 Pa. 522).

The plaintiff below did suffer damage. He was ready and willing to purchase one hundred crates of eggs at the price quoted in the telegram. The failure of the defendant to deliver the message promptly occasioned the damage suffered. Such misfeasance was the proximate cause of the damage. In the time of delay eggs increased $2 per crate. The plaintiff suffered then a total loss of $200 or $2 on every crate he could have bought.

The measure of damages is the actual loss sustained by the plaintiff due to the defendant's negligence. (Western Union Telegraph Co. vs. Landis 21 W. N. C. 38) (U. s. Telegraph Co. vs. Wenger cited supra) (Bailey vs. Western Union Telegraph Co. cited supra)—in which it was held that the negligent act of the defendant caused the loss and it must compensate the plaintiff for the injury done.

The defendant in his argument assumes that the Telegraph Co. closes at 5 P. M. and opens at 9 A. M. These facts do not appear in the case at bar and we are relieved from the necessity of determining recovery under those circumstances. Judgment for the plaintiff below.

OPINION OF SUPREME COURT

The learned court below has correctly stated the applicable law but has made a fundamental error in applying it and must be reversed.

The damage recoverable in every case is the **actual** damage suffered. This being so, an essential factor in a case such as this, is an allegation that an actual purchase was made at the increased

price and hence an actual loss sustained. In the instant case there is neither an allegation nor proof of a purchase at the increased price of $2 per crate. Hence the plaintiff has failed to show an essential element for the recovery of more than nominal damages—actual loss. If he did not make the purchase at the increased price—he has lost nothing. If he did make such a purchase, that fact must be shown. Cf. W. U. T. Co. v. Hall, 124 U. S. 444. A careful examination of the Pennsylvania cases will show the same doctrine is applied.

Hence, the learned court below in allowing a recovery of $200 has erred and must be **reversed.**

BOOK REVIEWS

Students' Manual of Bankruptcy Law and Practice by Lee E. Joslyn, of the Detroit (Michigan) bar, lecturer in bankruptcy, at the Detroit College of Law; and Referee in Bankruptcy; Published by Matthew Bender & Co., Albany, N. Y.

A comparatively small book, containing 181 pages, this work may be commended to the attention of students of law in law schools and elsewhere. It is, as the author terms it, a concise work on Bankruptcy Law. It has not been intended to cover "all the questions that may arise in the administration of large and complicated estates" but to be a "model for conducting the ordinary Bankruptcy case, voluntary or involuntary, through the court." The author disclaiming a work intended to rival Collier on Bankruptcy, claims that "substantially all questions that usually arise in the ordinary case in Bankruptcy have been discussed and covered."

The book is well supplied with references to cases, and its plan of exhibiting the outlines of the topic, without descending to masses of particulars, we think, with reference to students of law in schools and offices, entirely commendable. This book is worthy of the serious attention of instructors and learners.

Cases on the Law of Admiralty (British and American) by George de Forest Lord, of the New York bar, special lecturer on admiralty law, Columbia University Law School, and George C. Sprague, of the New York bar, Assistant Professor of law, New York University Law School, Published by West Publishing Company, St. Paul, Minn.

In a modest preface of eleven lines, the authors say that this collection of cases is the product of the experience of the editors "not in teaching alone, but in a practice at the admiralty bar." They

price and hence an actual loss sustained. In the instant case there is neither an allegation nor proof of a purchase at the increased price of $2 per crate. Hence the plaintiff has failed to show an essential element for the recovery of more than nominal damages—actual loss. If he did not make the purchase at the increased price—he has lost nothing. If he did make such a purchase, that fact must be shown. Cf. W. U. T. Co. v. Hall, 124 U. S. 444. A careful examination of the Pennsylvania cases will show the same doctrine is applied.

Hence, the learned court below in allowing a recovery of $200 has erred and must be **reversed.**

BOOK REVIEWS

Students' Manual of Bankruptcy Law and Practice by Lee E. Joslyn, of the Detroit (Michigan) bar, lecturer in bankruptcy, at the Detroit College of Law; and Referee in Bankruptcy; Published by Matthew Bender & Co., Albany, N. Y.

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refer to the extensive annotations, which as they believe, "cover most of the questions of admirality law which may be expected to arise in practice." The book is divided into twelve chapters and an appendix. The topics of the chapters are jurisdiction, maritime liens, rights of maritime workers, carriage of goods, charter parties, salvage, general average, marine insurance, pilotage, towage, collision, limitation of liability. The appendix gives specimens of various charter parties; viz: Bareboat Charter, Produce Exchange Time Charter, Voyage Charters, under which are given a Welsh Coal Charter party adapted to American use; Baltimore Berth Terms Grain Charter Party. Following these are the York Antwerp Rules of 1890.

The compilers refer to the extensive annotations. These are numerous and cite a large number of cases in corroboration of the cases to which they are appended. We think the collection of cases ample and the selection of them judicious. The book is worthy of the attention of all students and teachers of the subject of Admirality.

Cases on the law of Public Utilities, selected and annotated by Young B. Smith, Professor of Law in Columbia University, and Noel T. Dowling, Professor of Law in Columbia University.

Including cases and readings on Rates, collected by Robert L. Hale, lecturer on legal economics of Columbia University.

Published by West Publishing Company, St. Paul, Minn., 1926.

Prof Smith and Prof. Dowling note in the preface, the particular emphasis made in the collection on the body of law which has been developed under the Interstate Commerce Act, and similar State statutes. American cases have been selected in most instances. English cases are used to develop the history of certain common law doctrines. Most of the English cases are fully discussed in the American cases reported. In five chapters, are treated Regulation and Control of Business, Supervision of Public Utilities, Service Liability, and Rates.

Mr. Hale points out the confusedness of the law with respect to rates. If rates are to be regulated by the exchange value of the physical property, one set of conclusions as to rates will result. If public policy with respect to increasing the attraction of capital into the enterprise, or as regards other grounds, then standard rates may be sustained.

The cases given are numerous; and the notes are instructive, containing, as they do, references to important articles in leading law reviews. The collection of cases is judiciously made, and the book is well adapted to the study of what it terms Public Utilities.